Ho Mee Luang v Lo Ga Lung

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 20–24–62 OF 1996
TEE AH SING J
21 APRIL 1997

Civil Procedure *— Affidavits — Defective affidavit — Allegation that affidavit did not state deponent's residential or business address — Deponent was an undischarged bankrupt — Affidavit stated address of former employer and former occupation — Whether this was sufficient compliance of O 41 r 1(4) — Whether non-compliance, if any, should be treated as mere irregularity — Discretion of court — Rules of the High Court 1980 O 2 r 1, O 41 rr 1(4) & 4*

Counsel for the plaintiff raised a preliminary objection in respect of the affidavit of one Ngui Kwang Ing ('Ngui') on the ground that the affidavit did not state the deponent's residential nor business address in contravention of O 41 r 1 of the Rules of the High Court 1980 ('the RHC'). Ngui was an undischarged bankrupt. The address No 37, Jalan Tuanku Osman, 96000 Sibu given in his affidavit was the registered address of Dian Tong Holding Sdn Bhd, where the deponent was the former manager. Counsel for the plaintiff submitted that No 37, Jalan Tuanku Osman could not be a residential address. Neither could it be the business address because the deponent was a bankrupt and he could not carry on business.

Held, dismissing the preliminary objection:

The deponent had given his former occupation and the business address of his former employer and therefore there had been sufficient compliance with O 41 r 1(4) of the RHC. Further, the address No 37, Jalan Tuanku Osman, 96000 Sibu was not an illusory address.

Also, even if the deponent had not stated No 37, Jalan Tuanku Osman, 96000 Sibu as his residential or business address, in exercise of the power under O 41 r 4 of the RHC, the court could allow the affidavit to be used in evidence. Such failure, if any, should be treated as a mere irregularity not nullifying the said affidavit by virtue of O 2 r 1 of the RHC (see pp 619I and 620A–B).

[Bahasa Malaysia summary

Peguam plaintif membangkitkan bantahan permulaan berkenaan dengan afidavit seorang bernama Ngui Kwang Ing ('Ngui') atas alasan bahawa afidavit tidak menyatakan alamat rumah atau alamat perniagaan deponen yang melanggar A 41 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Ngui merupakan seorang bankrap yang belum dilepaskan. Alamat di No 37, Jalan Tuanku Osman, 96000 Sibu yang diberikan dalam afidavitnya adalah alamat berdaftar Dian Tong Holding Sdn Bhd, di mana deponen adalah bekas pengurus. Peguam plaintif berhujah bahawa No 37, Jalan Tuanku Osman tidak mungkin merupakan suatu alamat rumah. Ia juga tidak boleh dikatakan sebagai suatu alamat perniagaan kerana deponen adalah seorang bankrap dan dia tidak boleh menjalankan perniagaan.

Diputuskan, menolak bantahan permulaan: A

Deponen telah memberikan pekerjaannya yang dahulu dan alamat perniagaan bekas majikannya dan oleh itu terdapat pematuhan A 41 k 1(4) KMT yang secukupnya. Seterusnya, alamat No 37, Jalan Tuanku Osman, 96000 Sibu bukanlah alamat yang tidak benar.

Juga, jikapun deponen tidak menyatakan No 37, Jalan Tuanku B Osman, 96000 Sibu sebagai alamat rumah atau alamat perniagaannya, dalam melaksanakan kuasa di bawah A 41 k 4 KMT, mahkamah boleh membenarkan afidavit itu digunakan dalam keterangan. Kegagalan sedemikian, jika pun ada, patut dianggap sebagai luar aturan yang tidak membatalkan afidavit itu memandangkan A 2 k 1 C KMT (lihat ms 619I dan 620A–B).]

Notes

For a case on defective affidavit, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 193. D

Legislation referred to

Rules of the High Court 1980 O 2 r 1, O 41 rr 1(4), 4

Ting Sing Chuan (*Yong & Wong*) for the plaintiff.
George Lim (*Battenberg & Talma*) for the defendant. E

Cur Adv Vult

Tee Ah Sing J: The learned counsel for the plaintiff raised a preliminary objection in respect of the affidavit of Ngui Kwang Ing affirmed on 6 December 1996 on the ground that the affidavit did not state the F deponent's residential nor business address. This is in contravention of O 41 r 1 of the Rules of the High Court 1980 ('the RHC'). In support, *The Supreme Court Practice* 1995 (Vol 1) Pt 1 at p 700 para 41/1/8 was cited. Paragraph 41/1/8 reads as follows:

> *Place of residence or work place.* Affidavits giving no address, or only an G illusory address, were rejected (*Hyde v Hyde* (1888) 59 LT 523). See also *Re Levy* (1889) 37 WR 396.
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> Paragraph (4) enables the deponent to an affidavit to give, not his place of residence, but the address at which he works when he is giving evidence by affidavit in a professional, business or other occupational capacity and in H such case he must also state the position he holds and the name of his firm or employer if any. This, of course, is without prejudice to the power of the Court under r 4, to allow a defective or irregular affidavit to be filed or used in evidence and the larger power under O 2(2) to validate any irregularity in any document by reason of any non-compliance with the RSC.

The learned counsel for the defendant submitted that the court has the I discretion to allow the affidavit to be used under O 2 of the RHC. The White Book cited by the plaintiff points that the court has the discretion. He also submitted that there is no other evidence to prove that No 37 Jalan Tuanku Osman is not the residential or the business address by virtue of

A the fact that Mr Ngui Kwang Ing was an undischarged bankrupt. He submitted that the address and profession of the deponent has sufficiently been identified as to have complied with O 41 r 1 of the RHC.

In reply, the learned counsel for the plaintiff submitted that No 37, Jalan Tuanku Osman cannot be a residential address. It can neither be the B business address because the deponent is a bankrupt and he cannot carry on business. In para 1 of the deponent's affidavit, the deponent did not state his present occupation, therefore did not comply with O 41.

Order 41 r 1(4) of the RHC reads as follows:

C (4) Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state the fact.

The relevant part of the affidavit of Ngui Kwang Ing affirmed on D 6 December 1996 reads as follows:

I, Ngui Kwang Ing of No 37, Jalan Tuanku Osman, 96000 Sibu ...

(1) I am the former manager of Dian Tong Holding Sdn Bhd and the facts deposed hereto are within my personal knowledge, belief and information ... .

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Exhibit 'N1' to the said affidavit is an agreement. The relevant part of the agreement reads as follows:

An agreement is made this 15 October 1992 between Dian Tong Holding Sdn Bhd, a company incorporated and registered in Malaysia under the F Companies Act 1965 and its registered address at No 37 Jalan Tuanku Osman 96000 Sibu ... .

The relevant part of the affidavit of Ho Mee Luang affirmed on 20 December 1996 reads as follows:

(3) I dispute that No 37, Jalan Tuanku Osman, 96000 Sibu is the residential G address of the said Ngui Kwang Ing as alleged in his affidavit nor is the said address his business address because the said Ngui Kwang Ing was and still is an undischarged bankrupt. As such, the said affidavit ought to be struck out.

In the affidavit of Ngui Kwang Ing, the deponent has deposed that he was H the former manager of Dian Tong Holding Sdn Bhd. And the address No 37, Jalan Tuanku Osman, 96000 Sibu given in his affidavit is the registered address of Dian Tong Holding Sdn Bhd. I am of the view that the deponent has given his former occupation and the business address of his former employer and therefore there has been sufficient compliance with O 41 r 1(4) of the RHC. Further, the address No 37, Jalan Tuanku I Osman, 96000 Sibu is not an illusory address.

Order 41 r 4 of the RHC provides as follows:

4 An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

I am of the view that even if the deponent did not state No 37, Jalan Tuanku Osman, 96000 Sibu as his residential or business address, in exercise of the power under O 41 r 4 of the RHC, I allow that the said affidavit be used in evidence. A

Such failure, if any, should be treated as a mere irregularity not nullifying the said affidavit (see O 2 r 1 of the RHC). B

In view of the foregoing, I overrule the preliminary objection with costs to be taxed unless agreed upon by the parties.

Preliminary objection dismissed.

Reported by Jafisah Jaafar C

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